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IN THE SUPREME COURT

OF THE UNITED STATES

1650

DANIEL CALVIN MILLIGAN

vs.

STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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277-6620 and 879-1444

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INDEX

	Pages
Opinion Below	1
Jurisdiction	2
Questions Presented	2 - 3
Constitutional Provisions Involved	3 - 4
Statement of the Case	4 - 13
Reasons for Granting the Writ	14 - 40
Conclusion	40
Appendix A	1 - 28

LIST OF AUTHORITIES CITED

CASES	Pages
Boykin vs. Alabama, 395 U. S. 238 (1969)	22
Brookhart vs. Janis, 384 U. S. 1 (1966)	22, 23, 24
Chapman vs. California, 386 U. S. 18 (1967)	21, 22, 24, 27
Dickey vs. Florida, 398 U. S. 30 (1970)	22
Escobedo vs. Illinois, 378 U. S. 478 (1964)	31, 38, 39
Fahy vs. Connecticut, 375 U. S. 85	27
Gideon vs. Wainwright, 372 U. S. 335 (1963)	21, 24
Griffin vs. California, 380 U. S. 609 (1965)	32
Johnson vs. New Jersey, 384 U. S. 719 (1966)	38

	Pages
Malloy vs. Hogan, 378 U. S. 1 (1964)	32
Miranda vs. Arizona, 384 U. S. 436 (1966)	37, 38, 39, 40
Payne vs. Arkansas, 356 U. S. 560 (1958)	21
People vs. Crooker, 47 Cal. 2d 348, 352-354	25
People vs. Davis, 48 Cal. 2d 241, 257	18, 19, 20, 25
People vs. Deloney, 41 Cal. 2d 832 (1953)	31
People vs. Dorado, 62 Cal. 2d 338 (1965)	22, 31, 38
People vs. Ford, 60 Cal. 2d 772 (1964)	30
People vs. Ibarra, 60 Cal. 2d 460 (1963)	33
People vs. Johnson, 70 Cal. 2d 469 (1969)	38, 39

	Pages
People vs. Mabry, 71 A. C. 448, 462	17
People vs. Matthews, 264 Cal. App. 2d 557 (1968)	37
People vs. Nye, 38 Cal. 2d 34 (1951)	29
People vs. Reed, 270 Cal. 2d 37 (1969)	31
People vs. Rollins, 65 Cal. 2d 681 (1967)	38
People vs. Sievers, 255 Cal. App. 2d 34 (1967)	38
People vs. Trolinder, 121 Cal. App. 2d 819 (1953)	29
People vs. Wein, 50 Cal. 2d 383 (1958	29
Tumey vs. Ohio, 273 U. S. 510 (1927)	21

TREATISES

	Pages
California Jury Instructions Criminal, 3d ed.	30, 31

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OPINION BELOW

Reproduced in Appendix A is the unpublished opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, People vs. Milligan, 2d Criminal No. 17793, filed December 4, 1970, hereafter sometimes referred to as "unpublished California Court of Appeal opinion, 2d Criminal No. 17793." Petitioner's petitions for rehearing in the above mentioned court and for hearing in the Supreme Court of the State of California were denied without opinions.

JURISDICTION

Petitioner appealed from the judgment of the Superior Court of Los Angeles County, Superior Court No. 314468. In an unpublished opinion filed December 4, 1970 -- People vs. Milligan, 2d Criminal No. 17793 -- the Court of Appeal of the State of California, Second Appellate District, Division Three reversed in part and affirmed in part. That court denied petitioner's petition for rehearing on December 23, 1970. The Supreme Court of the State of California denied petitioner's petition for hearing on January 28, 1971.

This Court has jurisdiction under 28 U. S. C. § 1257 (3).

QUESTIONS PRESENTED

1. Whether the concession of petitioner's guilt made by petitioner's trial counsel during his argument to

the jury, which was not justifiable on any tactical grounds, was harmful constitutional error, as a denial of petitioner's constitutional rights to plead not guilty and to be adequately represented by counsel?

2. Whether evidence of the confession petitioner allegedly made should have been suppressed as having been obtained in violation of petitioner's constitutional rights, because petitioner was not readvised of his privilege against self-incrimination and his right to counsel prior to an interrogation by a deputy sheriff which occurred in the context of an interview petitioner was having with his parole officer?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows: "No person

...shall be compelled in any criminal case to be a witness against himself..."

The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him... and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the Constitution of the United States provedes in pertinent part as follows: "...nor shall any State deprive any person of life, liberty or property without due process of law..."

STATEMENT OF THE CASE

The facts are set forth below as they are stated on pages 3-5 of the unpublished opinion of the Court of Appeal of the State of California, 2d Criminal No. 17793:

"On November 13, 1965 Carlene and Linda, door-to-door salesgirls, while attempting to sell magazine subscriptions to defendant, told him that they were interested in modeling, and accepted a dinner invitation from defendant and his wife. The girls discussed hair styles with defendant's wife. Defendant offered to pay them $7.00 apiece to allow him to take photos of them "from the neck up." The girls agreed and signed a document, ostensibly for the purpose of allowing defendant to sell the photos to any magazine of his choice. Defendant told them to wait for him in his parked car and that he would drive them to an office where the photos whould be taken. Defendant and his wife then drove the girls from the defendant's apartment in West Covina to an office in South El Monte.

"At the office defendant unlocked the door, and paid the girls $14.00. Defendant's wife fixed one girl's hair. Defendant seated the girls side by side so that their heads were close together. He then told his wife to 'get the things ready.' Defendant then knocked the girls' heads together, stating that this was a sample of what they could expect if they did not cooperate. Defendant then told the girls to stand up. His wife handed him a knife which he held at Linda's throat. The hands of both girls were taped behind their backs. Defendant informed the girls he intended to rape them, to force them to engage in unnatural sex acts with him and each other, and that they had a choice of being raped by eight or nine men and then killed, or of working as prostitutes for six months

and then be killed. He then ordered them into the warehouse portion of the building.

"In the warehouse defendant attempted to force Carlene to orally copulate Linda. Thereafter, both girls were gagged. Defendant stated that he would leave them in the warehouse for a couple of hours to think over his proposition. Linda began to mumble through her gag, it was removed. She then informed defendant that her baby was with a sitter, and that if she did not pick the baby up by a certain time, the police would be called. Defendant and his wife then drove Linda to pick up the baby, leaving Carlene in the warehouse. During their absence Carlene escaped, notified the police, and defendant and his wife were arrested upon their return."

In an eight count information filed by the District Attorney of the County of Los Angeles, petitioner and his wife

were charged in counts I and II with false improsonment, in counts III and IV with kidnapping, in count V with assault with a deadly weapon, in count VI with attempted sexual perversion, in count VII with burglary and in count VIII with conspiracy to commit the aforementioned crimes except count VI. Petitioner was also charged with, and admitted, a prior conviction of a felony.

Petitioner was tried by a jury in the Superior Court of the County of Los Angeles, Judge Howard D. McClain presiding.

When the prosecution sought to introduce testimony concerning his alleged confession, petitioner objected on two grounds: that he had not been readvised of his constitutional rights prior to the particular interrogation involved; and that petitioner thought that he

was going to be interviewed by his parole officer (Rep. Tr. p. 270).

On pages 8-9 of their unpublished opinion, 2d Criminal No. 17793, the Court of Appeal of the State of California stated the evidence on this point as follows:

"Advice to Remain Silent. Shortly after defendant's arrest, Deputy Sheriff Knowles advised defendant 'that he had a right to remain silent; that anything he said could be used -- might be used against him in a court of law, and that he had a right to have an attorney present at any of the following proceedings. He stated that he understood.' When the officer was questioned: 'Did you ask him if he did,' the officer replied: 'Yes, sir. I asked him; he stated that he did.' This testimony was corroborated

by Deputy Brown. Defendant denied that he was informed of his right to counsel. Immediately after the warnings Deputy Brown asked defendant if he wished to make a statement. Defendant replied that he had taken the girls to the warehouse for some modeling they had agreed to do; that they backed out of the agreement; and that he reacted by binding and gagging them. He denied knowledge of the knife found in an attache case in his car.

"Prior to the second interrogation about an hour later, Sergeant Griffin advised defendant 'that he was entitled to an attorney at all stages of the proceedings; anything he said could be used against him, and he was entitled to remain silent. I asked him if he understood what I was saying. He replied, "Yes," and nodded his head

affirmatively.' Defendant then stated that the girls had backed out of the deal to model for him and that when they refused to return his $14.00, he bound them. He denied banging their heads together and also denied any sexual activity.

"Ten or eleven hours thereafter Sergeant Griffin interviewed defendant in the presence of his parole officer; defendant was not readvised of his constitutional rights. At this time defendant confessed to the crimes."

In his argument to the jury at the conclusion of the guilt phase of the trial, petitioner's trial counsel made the following statement, of which petitioner complained in the courts below and complains herein: "I don't expect to have a winner here in the first part of the trial." (Rep. Supp. Tr.

pp. 32-33.)

Petitioner was found guilty of each offense charged, to have been armed at the time of the commission ot the offenses, and to have been sane at the time of the commission of the offenses.

Criminal proceedings were adjourned, mentally disordered sex offender proceedings were commenced, and on August 11, 1966 petitioner was adjudged a mentally disordered sex offender and ordered committed to the state hospital.

On August 22, 1969, petitioner was returned from the state hospital, criminal proceedings were resumed, and on October 29, 1969 judgment was entered. Petitioner was sentenced to state prison for the time prescribed by law on each count, the sentences on counts I through VI and VIII were ordered to run concurrently with the sentence on

count VII. The sentences on counts I through VI and VIII were stayed pending any appeal and during the service of the sentence on count VII, and on completion of the service of the sentence thereon, the stay to become permanent.

Petitioner appealed from the judgment of the trial court. The Court of Appeal of the State of California, in an unpublished opinion filed December 4, 1970, reversed as to counts III and IV (kidnapping) and as to count VIII (conspiracy); in all other respects the judgment was affirmed.*

Petitioner's petition for rehearing in that court was denied on December 23, 1970. The Supreme Court of the State of California denied petitioner's petition for hearing on January 28, 1971.

*People v. Milligan, 2d Criminal No. 17793, filed December 4, 1970. (Appendix A)

REASONS FOR GRANTING THE WRIT

I. This case presents substantial constitutional issues involving petitioner's right to plead not guilty and to be adequately represented by counsel, which rights were denied when petitioner's trial counsel conceded petitioner's guilt, without any tactical justification, during his argument to the jury.

II. This case presents substantial constitutional issues involving petitioner's privilege against self-incrimination and right to counsel, which were violated when petitioner's alleged confession was admitted although he had not been readvised of his constitutional rights.

I Defense Counsel's Concession of Petitioner's Guilt in His Jury Argument Was Harmful Constitutional Error in That It Was a Denial of Petitioner's Constitutional Rights to Plead Not Guilty and To Be Adequately Represented By Counsel.

A. The Concession of Petitioner's Guilt, Made By Petitioner's Trial Counsel In His Argument To The Jury, Was Not Justifiable On Tactical Grounds.

In his argument to the jury at the conclusion of the guilt phase of petitioner's trial, petitioner's trial counsel conceded petitioner's guilt. Counsel indicated that he was seriously contesting only the sanity issue, which was to be considered in the next phase of the bifurcated trial.

The entire jury argument made by petitioner's trial counsel at the conclusion of the guilt phase of the trial is set forth below:

"Mr. Zeman: May it please the Court, Mr. Whichello.

"We are fortunate to have a prosecutor like Mr. Whichello, who has been very fair in the presentation of this case. And it is a pleasure to be in a courtroom with a man of his integrity.

"I haven't put on any witnesses. I haven't cross-examined very much. A few questions. That doesn't mean, ladies and gentlemen, that the defendant is throwing in the towel, so to speak.

"You have been selected by me because, as I say, I like your appearance, because I know that you will be fair. I don't expect to have a winner here in the first part of the trial.

May I state I think the presentation of the evidence by Mr. Whichello has been accurate, honest, direct and forthright. But there is another part of this trial, and when we get to the other part of this trial, which will be this afternoon, I want you to remember what you heard here on the witness stand, and then I will present the defendant's plea of not guilty by reason of insanity. And then I will probably present a little more evidence than you have heard here today.

"Thank you, your Honor." (Rep. Supp. Tr. pp. 32-33)

As respondent pointed out below: "Such argument is proper if made for tactical reasons. See People vs. Mabry, 71 A. C. 448, 462. However, such argument must be tactical and counsel must have something to gain. See People vs.

Davis, 48 Cal. 2d 241, 257, wherein such a remark not made for tactical reasons was held to be erroneous." (Res. Supp. Br. pp. 3-4)

The court below considered and expressly rejected the suggestion that the conduct in question could be justified as "tactics." As the court observed, one cannot conceive of any way in which petitioner could have benefitted from a concession of his guilt.

Although by this statement defendant's counsel did not expressly admit guilt, it clearly indicated that defense counsel expected the jury to return a verdict of guilty.

"Whatever trial strategy or tactics an attorney may employ in the defense of an accused he may not enter a plea of guilty to a felony without the con-

sent of his client. (Pen Code § 1018). It is a violation of his duty of fidelity to his client to assume a position adverse or antagonistic to him without the latter's free and intelligent consent after full knowledge of all the facts and circumstances. (Citations) This consent was not given. Without such consent an attorney may not surrender any substantial right of the accused. (Citations) Nor may he impair, compromise or destroy his client's cause of action. (Citations)... The issues in a criminal case must be decided in accordance with the evidence. The jury is the exclusive judge of the questions of fact submitted to it and of the credibility of the witnesses presented... In arguing to the jury (counsel) is limited to a discussion of or to comment upon the facts in evidence." (People vs. Davis, 48 Cal.

2d 241, 256-257)

We perceive no way in which the statement of defense counsel could have aided defendant. It was in effect a concession of guilt to each count of the information.*

B. A Concession of a Defendant's Guilt Made by the Defendant's Counsel in His Argument to the Jury, Which Cannot Be Justified as "Tactics," Should Be Held Harmful Constitutional Error Per Se,

*Pages 6-7 of an unpublished opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three, People vs. Milligan, 2d Criminal No. 17793, filed December 4, 1970. (Appendix A)

as a Denial of the Constitutional Right to Plead Not Guilty and the Constitutional Right to Adequate Representation by Counsel.

Although declining to hold that "all constitutional errors, regardless of the facts and circumstances, must always be deemed harmful," the Court has noted that "our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Chapman vs. California, 386 U. S. 18, 21, 23, (1967) The examples the Court gave in Chapman were coerced confession (Payne vs. Arkansas, 356 U. S. 560 [1958]), right to counsel (Gideon vs. Wainwright, 372 U. S. 335 [1963]), and right to an impartial judge (Tumey vs. Ohio, 273

U. S. 510 [1927]). Chapman vs. California, supra, 386 U. S. 18, 23 n. 8. Other examples would include denial of the right of cross-examination where a defendant's attorney, in effect, pleaded him guilty without his consent (Brookhart vs. Janis, 384 U. S. 1, 3 [1966]), confessions obtained in violation of the rights to counsel and to remain silent (People vs. Dorado, 62 Cal. 2d 338, 356 [1965]), and, possibly, prosecutorial delays of great length (Dickey vs Florida, 398 U. S. 30, 55 n. 20 [1970]), Brennan, J. concurring).

A defendant cannot be held to a guilty plea unless he has either entered it personally or knowingly and understandingly acquiesced in his attorney's entry of such a plea. Brookhart vs. Janis, supra, 384 U. S. 1 (1966); see Boykin vs. Alabama, 395 U. S. 238 (1969).

Petitioner's formal entry of a not

guilty plea was actually as empty a gesture as was the defendant's futile protestation in Brookhart that he was "in no way... pleading guilty." The concession of petitioner's guilt made by his trial counsel to the jury was just as much the practical equivalent of a guilty plea as was the "prima facie trial" consented to by the defense counsel in Brookhart. Under the prima facie trial procedure exemplified in Brookhart, the prosecution makes only a prima facie showing of guilt and the defense does not offer evidence or cross-examine witnesses. The resulting denial of the right of cross-examination was held to be a constitutional error requiring automatic reversal. Brookhart vs. Janis, supra, 384 U. S. 1, 3 (1966). The shallow defense mounted by petitioner's trial counsel before he ultimately conceded petitioner's guilt just as effective-

ly denied petitioner's right of cross-examination. Petitioner's trial counsel did not cross-examine either of the two star prosecution witnesses, the alleged victims. The defense rested without presenting any witnesses or evidence. (Rep. Tr. p. 282) Automatic reversal is required by Brookhart vs. Janis, supra.

Counsel who concedes his client's guilt to the jury is worse than no counsel at all. Automatic reversal is also required by Gideon vs. Wainwright, supra, 372 U. S. 335 (1963).

C. If the Court Declines to Hold That The Error Was Harmful Constitutional Error Per Se, Then the Error Should Be Held Harmful Constitutional Error under the Standard of Chapman vs. California, 386 U. S. 18 (1967).

1. In finding the error harmless the court below applied the pre-Chapman standard of harmless constitutional error.

The harmless error rule which the court below expressly applied was the "miscarriage of justice" standard:

> "...to constitute a denial of due process, the rights of a defendant must suffer such an interferenace or interruption 'as to fatally affect the regularity of the trial and conviction and result in a miscarriage of justice. (People vs. Davis, supra, 48 Cal. 2d 241, 258; People vs. Crooker, 47 Cal. 2d 348, 352-254.)*

*Page 7 of an unpublished opinion, People vs. Milligan, 2d Criminal No. 17793, filed December 4, 1970, Appendix A.

Applying the "miscarriage of justice" standard, the court held the error harmless:

> "Here at the conclusion of the guilt phase of the trial, the jury had before it the uncontradicted testimony of the two victims and the uncontradicted testimony of a police officer of a confession. Defendant offered no evidence. Under such circumstances it was apparent that defendant would not prevail; the statement of defense counsel could neither have materially influenced the verdict, nor have caused a miscarriage of justice."*

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*Pages 7-8 of an unpublished opinion of People vs. Milligan, 2d Criminal No. 17793, filed December 4, 1970, Appendix A

The California "miscarriage of justice" standard of harmless constitutional error was expressly rejected in Chapman vs. California, 386 U. S. 18, 23-24 (1967)

> "... The California constitutional rule emphasized a 'miscarriage of justice,' but the California courts have neutralized this to some extent by emphasis, and perhaps overemphasis, upon the court's view of 'overwhelming evidence.' We prefer the approach of this Court in deciding what was harmless error in our recent case of Fahy vs. Connecticut, 375 U. S. 85. There we said: 'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. Id., at 86-87. ... We, therefore, do no more than adhere to

the meaning of our Fahy Case when we hold, as we do now, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

2. The concession of guilt by petitioner's trial counsel was a constitutional error which was not harmless beyond a reasonable doubt.

The reasons given by the court below for its conclusion that the statement of petitioner's counsel could not have materially influenced the verdict fail to demonstrate that the error was harmless beyond a reasonable doubt. The reasons, stated at pages 7-8 of its unpublished opinion, were that:

1. There was the uncontradicted testimony of the two victims;

2. There was the uncontradicted testimony by a police officer of a confession; and

3. Defendant offered no evidence.*

As to the uncontradicted testimony of the two victims: In prosecutions for sex offenses, including acts of sexual perversion, accusations are easily made and difficult to disprove. Therefore the law requires that the testimony of the prosecuting witnesses be viewed with caution by the jury. People vs. Wein, 50 Cal. 2d 383, 406 (1958); People vs. Nye, 38 Cal. 2d 34, 40 (1951); People vs. Trolinder, 121 Cal. App. 2d

*People vs. Milligan, 2d Criminal No. 17793, filed December 4, 1970, Appendix A

819, 824 (1953); California Jury Instructions Criminal, 3d ed., No. 10.44. Moreover, the reason the testimony of the victims remained "uncontradicted" is that petitioner's trial counsel neither cross-examined them nor presented any defense witnesses. It would be tragically ironic if these further manifestations of the fact that petitioner was denied his constitutional right to adequate representation by counsel should be construed, instead, as manifestations of his guilt. The vice in the "defense" conducted by his counsel was that it was, in fact, a concession of petitioner's guilt.

As to the uncontradicted testimony of a police officer regarding petitioner's alleged confession: The law requires that evidence of oral admissions or a confession by a defendant be viewed with caution by the jury. People vs. Ford,

60 Cal. 2d 772, 799 (1964); People vs. Deloney, 41 Cal. 2d 832, 840 (1953); People vs. Reed, 270 Cal. 2d 37, 43 (1969). California Jury Instructions Criminal 3d ed., No. 2.70. Moreover, petitioner will contend below, under a separate heading, that evidence of the alleged confession should have been suppressed as having been obtained in violation of petitioner's constitutional rights under Escobedo vs. Illinois, 378 U. S. 478 (1964) and People vs. Dorado, 62 Cal. 2d 338 (1965).

As to the absence of a defense: The most likely defense witness would have been petitioner himself. To the extent that the court's reference to the absence of a defense can be interpreted as an oblique reference to the failure of petitioner to testify, the court seems perilously close to drawing an

unfavorable inference from petitioner's exercise of his constitutional right not to testify. The Fifth Amendment privilege against self-incrimination is made fully applicable to the states by the Fourteenth Amendment. Malloy vs. Hogan, 378 U. S. 1 (1964). A state may not constitutionally permit either a judge or a prosecutor to comment upon the failure of a defendant to testify. The vice of comment on the refusal to testify is that: "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." Griffin vs. California, 380 U. S. 609, 614 (1965). Insofar as the court's assessment of prejudice resulting from counsel's concession of guilt took into account petitioner's exercise of his privilege not to testify, the court impermissibly

imposed a penalty on the exercise of that constitutional privilege. Moreover, the absence of a defense in other respects may have been another manifestation of the fact that petitioner's counsel was conceding his guilt.

In conclusion, the conduct of petitioner's trial counsel was constitutional error which was definitely not harmless beyond a reasonable doubt. Chapman vs. California, supra, 386 U. S. 1. (1967). Indeed, counsel who thus concedes his client's guilt provides such inadequate representation as to reduce the trial to a "farce or sham." People vs. Ibarra, 60 Cal. 2d 460, 464 (1963).

II Evidence of the Confession Petitioner Allegedly Made to Deputy Griffin in the Course of His Interview With His Parole Officer Should Have

Been Suppressed as Having Been Obtained in Violation of Petitioner's Privilege Against Self-Incrimination and Right to Counsel.

A. Although Petitioner Had Been Advised of His Constitutional Rights Prior to an Interrogation Conducted About Ten Hours Earlier, Petitioner Was Not Readvised of His Rights Prior to His Interview with His Parole Officer.

The Court of Appeal of the State of California stated the evidence on this point as follows:

"Advice to Remain Silent. Shortly after defendant's arrest, Deputy Sheriff Knowles advised defendant 'that he had a right to remain silent; that anything he said could be used -- might be used

against him in a court of law, and that he had a right to have an attorney present at any of the following proceedings. He stated that he understood.' When the officer was questioned: 'Did you ask him if he did,' the officer replied: 'Yes, sir. I asked him; he stated that he did.' This testimony was corroborated by Deputy Brown. Defendant denied that he was informed of his right to counsel. Immediately after the warnings Deputy Brown asked defendant if he wished to make a statement. Defendant replied that he had taken the girls to the warehouse for some modeling they had agreed to do; that they backed out of the agreement; and that he reacted by binding and gagging them. He denied

knowledge of the knife found in an attache case in his car.

"Prior to the second interrogation about an hour later, Sergeant Griffin advised defendant 'that he was entitled to an attorney at all stages of the proceedings; anything he said could be used against him, and he was entitled to remain silent. I asked him if he understood what I was saying. He replied, "Yes," and nodded his head affirmatively.' Defendant then stated that the girls had backed out of the deal to model for him and that when they refused to return his $14.00, he bound them. He denied banging their heads together and also denied any sexual activity.

"Ten or eleven hours thereafter Sergeant Griffin interviewed de-

fendant in the presence of his parole officer; defendant was not readvised of his constitutional rights. At this time defendant confessed to the crimes." *

A. In the Circumstances of This Case, a Contemporaneous Warning to Petitioner of His Constitutional Rights Was Constitutionally Required Prior to the Interrogation During Which He Allegedly Confessed.

A contemporaneous warning of one's constitutional rights is required at the outset of each interrogation. People vs. Matthews, 264 Cal. App. 2d 557, 569 (1968).

People vs. Matthews, supra, relied on Miranda vs. Arizona, 384 U. S. 436, 469

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*Pages 8-9 of the unpublished opinion of People vs. Milligan, 2d Criminal No. 17793, filed December 4, 1970, Appendix A.

(1966). California restricted the application of Miranda vs. Arizona, supra, to cases the trial of which began after the date Miranda was announced, June 13, 1966. People vs. Rollins, 65 Cal. 2d 681, 686 (1967); see Johnson vs. New Jersey, 384 U. S. 719, 732-735 (1966). The trial in the instant case commenced in March of 1966. (Cl. Tr. pp. 34-36)

However, the contemporaneity of admonition required explicitly by Miranda is so essential to the adequate protection of the rights involved that it should be taken to have been implied by Escobedo vs. Illinois, 378 U. S. 478 (1964) and People vs. Dorado, 62 Cal. 2d 338 (1965).

People vs. Johnson, 70 Cal. 2d 469 (1969), was a case to which Escobedo, but not Miranda, applied. Citing People vs. Sievers, 255 Cal. App. 2d 34 (1967),

-- another case to which Escobedo, but not Miranda, applied -- the court noted that one warning has been held sufficient to cover subsequent interrogations. However, the court emphasized that it would be a factual question in each case whether or not a contemporaneous warning was required. People vs. Johnson, supra, 70 Cal. 2d 469, 477 (1969).

In the circumstances of this case a contemporaneous warning was constitutionally required. Petitioner was led to believe that he was going to be interviewed by his parole officer, as indeed he was. But, after lulling petitioner into believing that nothing more than such an interview was contemplated - by leaving the room and failing to repeat the admonitions, Deputy Griffin returned and harvested the poisonous fruits.

Insofar as Miranda established mere "etiquette," it might be unwise social policy to apply it retroactively, so as to give a windfall to those who had been accorded the substance of their constitutional rights. But insofar as Miranda is concerned, not with technical ritual, but with prophylaxis against such an unconscionable ruse intended to trick one out of one's constitutional rights -- then its protection should not be denied one whose trial took place a scant few months before June, 1966.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Richard H. Levin

RICHARD H. LEVIN
Attorney for Petitioner

APPENDIX A

A majority of the signers of the following opinion certify that it does not meet the standard for official publication under rule 976.

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,	2d Crim.
Plaintiff and Respondent,	No. 17793
v.	S. C. No.
DANIEL CALVIN MILLIGAN,	314468
Defendant and Appellant.	

Appeal from judgment of the Superior Court of Los Angeles County. Howard D.

McClain, Judge. Reversed in part; affirmed in part.

Richard H. Levin, under appointment by the Court of Appeal, for Defendant and Appellant.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, William V. Ballough, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and his wife (not a party to this appeal) were charged in counts I and II with false imprisonment (Pen. Code, Sects. 236, 237), in counts III and IV with kidnapping (Pen. Code, Sect. 207), in count V with assault with a deadly weapon (Pen. Code, Sect. 245), in count VI with attempted sexual perversion (Pen. Code, Sects. 664, 288a), in count VII with burglary (Pen. Code, Sect. 459), and in count VIII with conspiracy to commit the aforementioned crimes except count VI

(Pen. Code, Sect. 182). Defendant was also charged with, and admitted, a prior conviction of a felony. After jury trial defendant was found guilty of each offense charged, to have been armed at the time of the commission of the offenses, and to have been sane at the time of the commission of the offenses.

Criminal proceedings were adjourned, mentally disordered sex offender proceedings were commenced, and on August 11, 1966 defendant was adjudged to be a mentally disordered sex offender and ordered committed to the state hospital. (Welf. & Inst. Code, Sect. 5512.)*1.

On August 22, 1969, defendant was returned from the state hospital, criminal proceedings were resumed, and on October 29, 1969 judgment was entered. Defendant was sentenced to state prison for the time prescribed by law on each count, the sentences on counts I through

*1. Renumbered as Welf. & Inst. Code, Sec. 6316 in 1967.

VIII to run concurrently with the sentence on the burglary count (count VII). The sentences on counts I through VI and the sentence on count VIII were stayed pending any appeal and during the service of the sentence on count VII, and on completion of the service of the sentence thereon, the stay to become permanent. Defendant appeals from the judgment.

Contentions

Defendant contends that he was not adequately represented by counsel; that his confession was inadmissible since he was not advised of his constitutional right to remain silent contemporaneously with the interrogation which culminated in the confession; that the confession was obtained by an artifice; that a "naked cautionary instruction" relating to confessions and admissions misled the jury and constituted prejudicial error; that there was no evidence to support the conviction of burglary; that there was

insufficient evidence to support the conviction of kidnapping; that the trial court had no jurisdiction to commit him as a mentally disordered sex offender; that the statutory procedures to commit him therefore were not complied with, and that he should be given credit on his criminal sentence for the time spent under the commitment order as a mentally disordered sex offender.

Facts

On November 13, 1965 Carlene and Linda, door-to-door salesgirls, while attempting to sell magazine subscriptions to defendant, told him that they were interested in modeling, and accepted a dinner invitation from defendant and his wife. The girls discussed hair styles with defendant's wife. Defendant offered to pay them $7.00 apiece to allow him to take photos of them "from the neck up." The girls agreed and signed a document, ostensibly for the purpose of allowing

defendant to sell the photos to any magazine of his choice. Defendant told them to wait for him in his parked car and that he would drive them to an office where the photos would be taken. Defendant and his wife then drove the girls from the defendant's apartment in West Covina to an office in South El Monte.

At the office defendant unlocked the door, and paid the girls $14.00. Defendant's wife fixed one girl's hair. Defendant seated the girls side by side so that their heads were close together. He then told his wife to "get the things ready." Defendant then knocked the girls' heads together, stating that this was a sample of what they could expect if they did not cooperate. Defendant then told the girls to stand up. His wife handed him a knife which he held at Linda's throat. The hands of both girls were taped behind their backs. Defendant informed the girls he intended to rape

them, to force them to engage in unnatural sex acts with him and each other, and that they had a choice of being raped by eight or nine men and then killed, or of working as prostitutes for six months and then be killed. He then ordered them into the warehouse portion of the building.

In the warehouse defendant attempted to force Carlene to orally copulate Linda. Thereafter, both girls were gagged. Defendant stated that he would leave them in the warehouse for a couple of hours to think over his proposition. Linda began to mumble through her gag; it was removed. She then informed defendant that her baby was with a sitter, and that if she did not pick the baby up by a certain time, the police would be called. Defendant and his wife then drove Linda to pick up the baby, leaving Carlene in the warehouse. During their absence Carlene escaped, notified the police, and defendant and his wife were arrested upon their return.

Adequacy of Trial Counsel

Defendant contends that his trial counsel in his argument in the guilt phase of the trial conceded defendant's guilt and without his concurrence in effect abandoned his defense. The entire argument is as follows:

"We are fortunate to have a prosecutor like Mr. Whichello, who has been very fair in the presentation of this case. And it is a pleasure to be in a courtroom with a man of his integrity. () I haven't put on any witnesses. I haven't cross-examined very much. A few questions. That doesn't mean, ladies and gentlemen that the defendant is throwing in the towel, so to speak. () You have been selected by me because, as I say, I like your appearance, because I know that you will be fair. I don't expect to have a winner here in the first part of the trial. () May I state I think the presentation of the evidence by Mr. Whichello

has been accurate, honest, direct and forthright. But there is another part of this trial, and when we get to the other part of this trial, which will be this afternoon, I want you to remember what you heard here on the witness stand, and then I will present the defendant's plea of not guilty by reason of insanity. And then I will probably present a little more evidence than have heard here today. () Thank you, your Honor." (Italics added.)

Although by this statement defendant's counsel did not expressly admit guilt, it clearly indicated that defense counsel expected the jury to return a verdict of guilty.

"Whatever trial strategy or tactics an attorney may employ in the defense of an accused he may not enter a plea of guilty to a felony without the consent of his client. (Pen. Code, Sect. 1018.) It is a violation of his duty of fidelity to his client to assume a position adverse or

antagonistic to him without the latter's free and intelligent consent after full knowledge of all the facts and circumstances. (Citations.) This consent was not given. Without such consent an attorney may not surrender any substantial right of the accused. (Citations.) Nor may he impair, compromise or destroy his client's cause of action. (Citations.) . . .The issues in a criminal case must be decided in accordance with the evidence. The jury is the exclusive judge of the questions of fact submitted to it and of the credibility of the witnesses presented. . .In arguing to the jury (counsel) is limited to a discussion of or to comment upon the facts in evidence." (People v. Davis, 48 Cal.2d 241, 256-257.)

We perceive no way in which the statement of defense counsel could have aided defendant. It was in effect a concession of guilt to each count of the information. However, to constitute a

denial of due process, the rights of a defendant must suffer such an interference or interruption "as to fatally affect the regularity of the trial and conviction" and result in a miscarriage of justice. (People v. Davis, supra, 48 Cal.2d 241, 258; People v. Crooker, 47 Cal.2d 348, 352-354.)

Here at the conclusion of the guilt phase of the trial, the jury had before it the uncontradicted testimony of the two victims and the uncontradicted testimony of a police officer of a confession. Defendant offered no evidence. Under such circumstances it was apparent that defendant would not prevail; the statement of defense counsel could neither have materially influenced the verdict, nor have caused a miscarriage of justice.

Confession

Advice to Remain Silent. Shortly after defendant's arrest, Deputy Sheriff Knowles advised defendant "that he had a

right to remain silent; that anything he said could be used -- might be used against him in a court of law, and that he had a right to have an attorney present at any of the following proceedings. He stated that he understood." When the officer was questioned: "Did you ask him if he did " the officer replied: "Yes, sir. I asked him; he stated that he did." This testimony was corroborated by Deputy Brown. Defendant denied that he was informed of his right to counsel. Immediately after the warnings Deputy Brown asked defendant if he wished to make a statement. Defendant replied that he had taken the girls to the warehouse for some modeling they had agreed to do; that they backed out of the agreement; and that he reacted by binding and gagging them. He denied knowledge of the knife found in an attache case in his car.

Prior to the second interrogation about an hour later, Sergeant Griffin

advised defendant "that he was entitled to an attorney at all stages of the proceedings; anything he said could be used against him, and he was entitled to remain silent. I asked him if he understood what I was saying. He replied, 'Yes,' and nodded his head affirmatively." Defendant then stated that the girls had backed out of the deal to model for him and that when they refused to return his $14.00, he bound them. He denied banging their heads together and also denied any sexual activity.

Ten or eleven hours thereafter Sergeant Griffin interviewed defendant in the presence of his parole officer; defendant was not readvised of his constitutional rights. At this time defendant confessed to the crimes.

Defendant contends that a contemporaneous warning of one's constitutional rights is required at the outset of each interrogation, and that the testimony of

Sergeant Griffin as to the third interrogation was therefore inadmissible. He cites People v. Matthews, 264 Cal.App.2d 557, 569.

Matthews relied on Miranda v. Arizona, 384 U.S. 436 (16 L.Ed.2d 694, 86 S.Ct. 1602). Miranda applies only to trials commenced after June 13, 1966. (People v. Rollins, 65 Cal.2d 681, 686.) Trial in the instant case commenced March 21, 1966.

Defendant suggests, however, that Miranda principles as defined in Matthews are inherently implied in Escobedo-Dorado. (Escobedo v. Illinois, 378 U.S. 478 (12 L. Ed.2d 977, 84 S.Ct. 1758); People v. Dorado, 62 Cal.2d 338.) We find nothing in Escobedo-Dorado indicating that a warning of constitutional rights is necessary at the outset of each interrogation. There is express authority to the contrary. "One adequate warning sufficient to comply with the Constitution and the rules

declared in controlling cases decided by the United States Supreme Court and the Supreme Court of California is sufficient. We deem it unnecessary, and not required by any provision of the Constitution or rule of any decided cases of which we are aware, that more than one adequate warning be given to a person in custody who may later be subject to successive interrogations." (People v. Sievers, 255 Cal. App.2d 34, 38 (hrg. den.).)

The warnings here given by the police officers were sufficient to apprise defendant of his constitutional privileges as defined by federal and state authorities at the time given, and defendant signified his understanding of them. Failure to repeat the warnings at each successive interrogation, especially when they occurred within a relatively short period of time, did not render the confession inadmissible.

Artifice. Defendant contends that

his confession was inadmissible since it was obtained by the type of artifice condemned in Massiah v. United States, 377 U.S. 201 (12 L.Ed.2d 246, 84 S.Ct. 1199). In Massiah, defendant, while free on bail after having entered a not guilty plea, held a conversation, in the absence of his attorney, with a codefendant in the latter's automobile, unaware that the codefendant was cooperating with government agents who had installed a radio transmitter under the front seat of the automobile. The evidence obtained as a result was suppressed as being violative of the Fifth and Sixth Amendments of the Constitution.

The instant case is clearly distinguishable; there was no evidence of trickery. Defendant had been interrogated by Sergeant Griffin. The sergeant then arranged an interview between defendant and his parole officer. The sergeant then left the room, later returned, and during the course of

the interrogation that followed, defendant voluntarily made his confession. It was admissible.

Cautionary Instruction. Defendant contends that the giving of the following instruction, sua sponte, was prejudicial error: "Evidence of an oral admission or confession of the defendant ought to be viewed with caution." (CALJIC 29-D (re-revised).) *? The instruction is a correct statement of the law. In appropriate cases it should be given on the court's own motion. (People v. Scherr, 27? Cal.App.?d 165, 171.) However, it has been held that where a defendant testifies, the instruction must be amplified by making it clear to the jury that it refers only to defendant's extra-judicial statements and not to his in-court testimony. (People v. Wheelwright, ?6? Cal.App.?d 63, 70.) Here defendant did not testify at the guilt phase of the trial. The jury therefore could not have

*?. Now incorporated in CALJIC 2.71, 3d Ed.

been misled. The instruction was not given and was obviously inapplicable at the sanity phase of the trial. Even though defendant testified during the latter phase, it is unreasonable to believe that the jury was influenced by the instruction given in the earlier phase or that defendant was prejudiced thereby.

Burglary

Defendant contends that there was no evidence to support his conviction of burglary of the office-warehouse building; that the evidence clearly indicated that he worked there as an accountant for his stepfather, and had a key to the premises.

Burglary is defined as entry of a "warehouse . . . or other building . . . with intent to commit grand or petit larceny or any felony." (Pen. Code, Sect. 459.) (Italics added.)

In People v. Deptula, 58 Cal.2d 225, defendant worked in a bowling alley from 9:00 a.m. to 7:00 p.m., had keys to the premises and had been furnished the

combination of the safe. He entered the bowling alley about 5:30 a.m., killed the custodian, and looted the safe. The court held that the murder was committed in the perpetration of a burglary and affirmed a conviction of first degree murder, stating on page 228 that "the settled interpretation of the statute is that one who enters a room or building with intent to commit larceny is guilty of burglary even though express or implied permission to enter has been given to him personally or as a member of the public." Subsequently it has been held that the unlawful entry of a home with intent to commit murder was a burglary (People v. Talbot, 64 Cal.2d 691.) From these cases it is evident that whether an entry be unlawful or permissive is of little importance; it is the felonious intent preceding the entry which signifies the crime of burglary. We hold that the evidence was sufficient to support defendant's conviction of burglary.

Kidnapping

During argument the prosecutor told the jury that as to the kidnapping counts the People were not relying on the movement of Linda from the warehouse to the babysitter's house, since such movements were voluntary. He argued that the sole evidence of kidnapping upon which the People relied was the movement of the victims within the warehouse.

Relying on People v. Daniels, 71 Cal.2d 1119, 1130-1140, defendant argues that such movement was merely incidental to the assaults and did not substantially increase the risk of harm over and above that necessarily present in the other crimes. We agree. Accordingly, the judgments on counts III and IV (kidnapping of the two victims) must be reversed. Since count VIII charges defendant with conspiring to commit various criminal acts, including kidnapping, the judgment on count VIII (conspiracy) must also be

reversed.

Mentally Disordered

Sex Offender Proceedings

Defendant argues that he was improperly certified as a mentally disordered sex offender because he was ineligible for probation under section 1203 of the Penal Code (Welf. & Inst. Code, Sect. 6301)*3 and that therefore, under the authority of People v. Foster, 67 Cal.2d 604, 607-608, this court should vacate the commitment orders determining him to be a mentally disordered sex offender and give him credit on his sentence for the time spent under the temporary and indeterminate commitment orders.

In Foster mentally disordered sex offender proceedings were commenced on April 5, 1965. (67 Cal.2d at p. 607, fn.2.) As of that date a person previously convicted of a felony was expressly ineligible for probation (Pen. Code,

*3. Formerly Welf. & Inst. Code, Sect. 5500.5.

§ 1203) and therefore was not subject to commitment under mentally disordered sex offender proceedings. (Welf. & Inst. Code, § 5500.5.)[4/] To rectify the error made, the court stated at page 608: "Had the court not conducted those proceedings defendant undoubtedly would have been sentenced to prison sooner than he was. He is therefore entitled to credit on his sentence for the time spent under the temporary and indeterminate commitment orders."

In arguing its application to the instant case, defendant fails to note that after Foster, effective September 17, 1965, section 1203 of the Penal Code was amended by the addition of the following unnumbered paragraph: "In unusual cases, otherwise subject to the preceding paragraph, in which the interests of justice would best be

4/Renumbered as Welf.& Inst. Code §6301 In 1967.

served thereby, the judge may, with the concurrence of the district attorney, grant probation." (Italics added.) This provision was in effect on March 30, 1966 when the mentally disordered sex offender proceedings were commenced in the instant case. Thus in the instant case the court had jurisdiction to consider defendant's commitment as a mentally disordered sex offender. Had the Supreme Court in Foster intended to hold that in all cases persons sentenced should be given credit for time served under commitment orders, the Supreme Court could have so stated in appropriate language rather than base its ruling solely upon the erroneous commitment. We therefore hold that Foster is applicable only to the case where a court made an order of commitment in violation of an express prohibition of law, that

it is not applicable to the instant case if the committing court complied with the quoted paragraph of section 1203 of the Penal Code.

The authority of the court to commence mentally disordered sex offender proceedings in the instant case was conditional, "with the concurrence of the district attorney." Defendant's trial counsel requested that such proceedings be commenced. The prosecutor, although he referred to defendant as a mentally disordered sex offender and as a person who was in need of treatment, opposed the commitment because of the limited security at the state hospital; he argued that he could obtain treatment at a maximum security penal institution. On this appeal the People argue that since the prosecutor admitted the need for treatment and did not expressly

oppose the ultimate commitment order of the court, such facts must be deemed to be "concurrence of the district attorney." The People further state that if the record as to concurrence is deemed ambiguous, this court should remand the case for clarification.

We are of the opinion that remanding with instructions is not necessary for clarification of the record, that the stated condition is unconstitutional as being violative of the California constitutional separation of powers. (People vs. Tenorio, 3 Cal. 3d 89, 91-95)

In Tenorio defendant was convicted of possession of marijuana (Health & Saf. Code, §11530), and admitted a prior conviction of the same offense. The trial court dismissed the allegation of the prior conviction without the prior approval of the prosecutor,

a direct violation of section 11718, Health and Safety Code, which permits such action only "upon motion of the district attorney." The People contested the validity of this action by an appeal from the trial court's order granting probation. In affirming the order the Supreme Court pointed out at page 95 that "the discretion section 11718 purports to vest in prosecutors is unreviewable, and may therefore be exercised in a totally arbitrary fashion both in individual cases and by the adoption of county-wide policy precluding dismissal of priors regardless of the circumstances of individual cases." The Court then concluded that giving a partial advocate the power to prevent the exercise of judicial discretion was violative of the California constitu-

tional separation of powers.

We therefore hold that the condition set forth in the quoted paragraph of section 1203, Penal Code, "with the concurrence of the district attorney," is an unconstitutional invasion of the powers of the judiciary when applied to mentally disordered sex offender proceedings. (Health & Saf. Code, § 6300 et seq.), that the trial court had jurisdiction to commence such proceedings without the concurrence of the district attorney, that such proceedings were valid, and that defendant is not entitled to credit on his sentence for the time spent under the temporary and indeterminate commitment orders.

The judgment is reversed as to counts III and IV (kidnapping) and as to count VIII (conspiracy); in all

other respects the judgment is affirmed.

CERTIFIED FOR NONPUBLICATION

SCHWEITZER, J.

We concur:

FORD, P. J.

ALLPORT, J.